

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Closed Captioning and Video)
Description of Video Programming)

MM Docket No. 95-176

Implementation of Section 305 of)
the Telecommunications Act of 1996)

Video Programming Accessibility)

**COMMENTS OF PAY-PER-VIEW-NETWORK, INC.
D/B/A VIEWER'S CHOICE**

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February 28, 1997

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**COMMENTS OF PAY-PER-VIEW NETWORK, INC.
D/B/A VIEWER'S CHOICE**

Pay-Per-View Network, Inc. d/b/a Viewer's Choice ("Viewer's Choice"), by its attorneys, hereby submits its comments in response to the Notice of Proposed Rulemaking ("Notice"), released in the above-captioned proceeding on January 17, 1997.¹ The Commission's Notice seeks comment on proposed rules and implementation schedules for captioning of video programming, as required by Section 305 of the Telecommunications Act of 1996 ("1996 Act").² Section 305 added a new Section 713, Video Programming Accessibility, to the Communications Act of 1934, as amended, 47 U.S.C. § 713,

¹ FCC 97-4, released January 17, 1997.

² Pub.L. 104-104, 110 Stat. 56 (1996).

which requires the Commission to prescribe such rules by August 8, 1997.

I. STATEMENT OF INTEREST

Viewer's Choice is a leading provider of pay-per-view ("PPV") video programming services in the United States. Viewer's Choice is owned by two major motion picture studios, six multiple system cable operators, and Viacom International, Inc.³ Viewer's Choice offers eleven channels of PPV programming.

Viewer's Choice and the Viewer's Choice 2 services are variety channels which are available twenty-four (24) hours per day. These channels currently offer movies, special events, and other types of video programming having broad viewer appeal.

Viewer's Choice also offers four channels which carry a single box-office hit "Movie of the Day." In addition, four channels carry a single box-office hit "Movie of the Week."

Finally, Viewer's Choice offers "Hot Choice," which carries a variety of adventure, horror and science-fiction features, as well as adult movies and late evening specials.

³ Viewer's Choice is owned by Warner Brothers, Walt Disney, Time Warner Cable, Cox Cable, Continental Cable, Comcast, Newhouse, Liberty and Viacom. Each of the investors in Viewer's Choice, with the exception of Cox Cable, holds a 10% interest. Cox Cable holds a 20% interest.

Viewer's Choice channels are available through approximately 850 cable systems. These systems, on average, each carry three Viewer's Choice channels. Viewer's Choice estimates that at least one of its channels is available to approximately 17 million homes.

II. SUMMARY

Viewer's Choice believes that closed captioning is a laudable goal and, as a general matter, supports the Commission's proposal to carry out Congress' mandate while taking into consideration the sizable impact the closed captioning rules will have on parties in the programming production and distribution chain. Viewer's Choice submits, however, that the Commission must refine its proposed rules in several respects to ensure that the diversity of programming available to all viewers is not compromised. Specifically, Viewer's Choice recommends that the Commission: (1) phase in the captioning requirements for non-exempt new programming over a ten-year period with a final benchmark that is less than 100 percent; (2) forbear from imposing a quantitative benchmark for captioning of library programming; and (3) create general exemptions for interstitial material, PPV sports programming, and low-budget programming.

III. TRANSITION RULES FOR NON-EXEMPT NEW PROGRAMMING

Viewer's Choice believes it would be impractical to mandate immediate captioning of all non-exempt new video programming and that the need for a transition period of

substantial length is plain. As the Commission recognizes, there currently exists a limited number of captioners and captioning services, the costs of captioning are sizable, and forcing immediate compliance would impact negatively the continued availability of certain types of video programming.

Viewer's Choice supports the Commission's proposal that captioning of all non-exempt new programming be phased in over a ten-year period. This transition period will afford program providers, owners and producers sufficient time to determine how best to effect Congress' mandate that accessibility to video programming for the hearing impaired be increased. Because of the significant economic and technical issues facing the parties in the distribution chain, without a sufficient transition period, programming that already is captioned would be repeated regardless of demand, while other, more desirable programming would not be carried because of the difficulty and costs of securing the required captioning. Such a result would contravene Congress' stated intent that the rules ultimately adopted by the Commission not serve to decrease the diversity of programming available to all viewers, and would cripple the natural workings of the marketplace. A ten-year transition period would afford those parties in the distribution chain the discretion to allocate captioning resources in response to consumer demand, to the benefit of all viewers.

Viewer's Choice also believes that the final benchmark for the percentage of new programming that must be closed

captioned should be less than 100 percent. Given the realities surrounding the production and distribution of video programming, there inevitably will exist new programs which, for legitimate reasons, cannot be captioned and for which no general exemption exists. For example, scheduled programs might be received from their producers, uncaptioned, at the last minute, leaving networks or program providers insufficient time to provide captioning. Or, a provider might choose to air niche programming for which viewership is so low that the cost of captioning simply cannot be justified.

Under the rules proposed by the Commission, the appropriate parties involved in producing or distributing such new programming would be required to obtain a waiver of the Commission's rules. The specific circumstances involved, however, might not afford parties enough time to apply for and to secure a waiver. More importantly, the need to petition for such waivers in all likelihood would be frequent, creating a substantial burden on the resources of programmers and the Commission.

The most effective way to avoid this undue strain on limited resources would be for the Commission to create, in addition to whatever specific exemptions it deems advisable, what amounts to a general or miscellaneous exemption for a certain percentage of new programming. In other words, the Commission's final benchmark should be less than 100%, leaving programmers with the discretion to air a limited amount of uncaptioned new programming which does not fall into one of

the Commission's specific exemptions but which the programmer deems to be valuable to all viewers. This exempt percentage would be consistent with Congress' mandate that new video programming be fully accessible to the hearing impaired but would reduce the number of instances where exemptions or waiver requests would have to be pursued.

IV. TRANSITION RULES FOR NON-EXEMPT LIBRARY PROGRAMMING

Viewer's Choice submits that it is unnecessary for the FCC to set a quantitative benchmark for closed captioning of library programming. Attempts to caption such a vast amount of programming would be prohibitively expensive, and providers would be more likely to archive great quantities of such materials rather than pay to have them captioned. Moreover, it would be unfair to require owners and licensees of vintage programming to assume the costs of captioning such programming now, as these costs were neither calculated into the purchase price of such programming nor considered in planning the future use of video libraries.

As the record in this proceeding demonstrates, the amount of captioning of previously published programming has been increasing steadily in recent years. The success of voluntary captioning efforts proves it unnecessary to require completion of captioning video libraries by a date certain. Moreover, the amount of library programming that is closed captioned will increase naturally as a result of the obligation to caption new programming.

Viewer's Choice submits, therefore, that the Commission allow the marketplace to continue to work to "maximize accessibility" to library programming. These programs will, as they have been, be captioned in response to viewer demand. Commission forbearance from regulation with respect to older programs will ensure that program providers do not drop scheduled offerings prematurely, to the detriment of all viewers.

V. EXEMPTIONS

A. Interstitial Material Should Be Exempt From Captioning Requirements

Viewer's Choice supports the Commission's proposal that interstitial material be exempt from the closed captioning rules. Viewer's Choice uses interstitials to cross-promote its various channels. It is the experience of Viewer's Choice that, over the course of a year, for example, a large number of these primarily promotional "programs" are produced. By nature, interstitials are produced in a very short time period and have an abbreviated shelf life. Further, while not captioned, interstitials typically contain information that is material to the viewer in textual or graphic form.

Given the bulk of interstitials produced for any program network, the haste with which they are prepared, and the extremely short period of time in which they retain their usefulness, the burdens associated with captioning interstitials would be great. Conversely, any benefit to be

achieved from mandatory captioning would be negligible. As stated above, in most instances, through on-screen graphics, hearing impaired individuals have access to the material information contained in the audio portion of the interstitial material. In addition, television listings and promotional materials available elsewhere serve as important sources through which viewers access such information.

For the foregoing reasons, Viewer's Choice submits that interstitials generally should be exempt from the captioning requirements adopted by the Commission.

B. PPV Sports Programming Should Be Exempt From The Captioning Requirements

Viewer's Choice offers certain PPV sporting events, such as soccer and boxing, on its primary channel. A requirement that this type of sports programming be captioned would prove economically burdensome, while serving no real purpose. For the most part, PPV sporting events are visual. Viewers gain little, if anything, from the accompanying audio. Statistics and progress typically are indicated by graphics, thereby eliminating or reducing the need for captioning of such programming.

Further, these sporting events are typically live presentations. Captioning of "live" programming requires highly skilled captioners which are not available today in sufficient numbers to respond to a broad requirement that live programming be captioned. Closed captioning of PPV sporting

events, therefore, could prove not only unnecessary, but also infeasible.

C. Low-budget Programming Should Be Exempt From Closed Captioning Requirements

As described above, Viewer's Choice offers the PPV channel Hot Choice. During the day, Hot Choice is to some extent a variety channel, but it is targeted toward a niche audience, offering science fiction/horror/adventure and adult-oriented titles rather than a general variety of popular mainstream programming. During the evening and late-night, Hot Choice further narrows its niche, offering adult-oriented specials.

A significant portion of the programming available on Hot Choice, particularly the adult programming,⁴ is uncaptioned. These low-budget productions are not expected to be viewed by as large an audience as the variety channels with broader appeal. The license fees paid for these programs reflect this expectation.

If a closed captioning requirement were to be imposed on the Hot Choice channel, Viewer's Choice would be faced with the daunting prospect of captioning a large volume of programming. Particularly for the low-budget titles, expenditure of the considerable economic resources necessary

⁴ The adult-oriented programming specials available on Hot Choice are primarily visual, there is little dialogue, and the aural portion of the program serves a limited purpose. Captioning of this programming would provide hearing impaired viewers with no material benefit.

to accomplish this task could not be justified. Other distributors of niche programming undoubtedly would be faced with similar circumstances, and would be forced to consider seriously discontinuation of their offerings.

An exemption for low-budget productions would be consistent with Congressional intent as articulated in the 1996 Act. According to the legislative history of Section 713, Congress intended the Commission to balance the need for closed captioning against the possibility of inhibiting the production and distribution of programming and thereby restricting the diversity of programming available to the public. As described above, given the relatively small production budgets associated with certain programming, it would be difficult to justify the costs associated with closed captioning. The potential economic effect on the availability of this type of programming dictates against imposition of a mandatory captioning requirement.

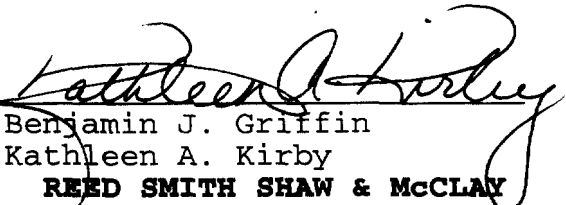
VI. CONCLUSION

Viewer's Choice does not dispute Congress' and the Commission's conclusion that maximizing accessibility to video programming for the hearing impaired is a worthy goal. Viewer's Choice, however, believes that the Commission should adopt closed captioning rules that not only serve to further this goal, but also to preserve the variety of programming available to all viewers. Viewer's Choice, therefore, urges

the Commission to refine its proposed rules as set forth
above.

Respectfully submitted,

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